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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~784~~ 28

CLOVERLEAF BUTTER COMPANY, A CORPORATION,
Petitioner,

vs.

HAYGOOD PATTERSON AS COMMISSIONER OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA, AND GEORGE H. MARSH, AS DIRECTOR OF THE DIVISION OF AGRICULTURAL CHEMISTRY IN THE DEPARTMENT OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

HORACE C. WILKINSON,
ERLE PETTUS,
VICTOR H. SMITH,
Counsel for Petitioner.

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CLOVERLEAF BUTTER COMPANY, A CORPORATION,
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HAYGOOD PATTERSON AS COMMISSIONER OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA, AND GEORGE H. MARSH, AS DIRECTOR OF THE DIVISION OF AGRICULTURAL CHEMISTRY IN THE DEPARTMENT OF AGRICULTURE & INDUSTRIES OF THE STATE OF ALABAMA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Points of Law.

Point A.

The decision of the Circuit Court of Appeals involved the construction of the Renovated Butter Act, which is an important question of Federal law which has not been, but should be settled by this Court.

Act, May 9, 1902, Chapter 784, 32 Stat. 193, as amended, Title 26, U. S. C. A. Int. Rev. Code, Chap. 16, Secs. 2320, 2321, 2322, 2323, 2324, 2325, 2326 and 2327.

Point B.

The Court of Appeals decided an important question of Federal law very probably in conflict with applicable decisions of this Court.

(1) The Renovated Butter Act specifically requires the United States Secretary of Agriculture to cause a rigid sanitary inspection to be made of packing stock butter and to determine whether or not raw materials used in its manufacture are unwholesome or deleterious to health in the finished product.

Section 2325 I. R. C.

(2) Federal legislation specifically requiring the United States Secretary of Agriculture to inspect packing stock butter in interstate commerce excludes like action by State officers.

Hines v. *Davidowitz* (MMS) 61 Sup. Ct. Rep. 399;
Oregon-Wash. R. R. Co. v. *Wash.*, 270 U. S. 87;
Napier v. *Atl. Coast Line R. R. Co.*, 272 U. S. 606;
Northern Pacific R. R. v. *Wash.*, 222 U. S. 370;
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C. R. I. & P. Co. v. *Hardwick Co.*, 226 U. S. 426;
Adams Express Co. v. *Croninger*, 226 U. S. 491;
Erie R. R. v. *New York*, 233 U. S. 671;
New York Central R. R. v. *Winfield*, 244 U. S. 147;
Erie R. R. Co. v. *Winfield*, 244 U. S. 170;
Charleston & W. C. R. R. Co. v. *Varnville Furniture Co.*, 237 U. S. 597.

(3) The main purpose of the Renovated Butter Act was to provide for the sanitary inspection of such butter and

place of manufacture in order to eliminate all butter injurious to the health of the consumer.

U. S. v. *Bohl*, 125 Fed. 625.

(4) Packing stock butter is in stream of interstate commerce from the time it is purchased until it is manufactured into the finished product and delivered to the consignee.

Currin v. *Wallace*, 306 U. S. 1;
Dahnke-Wallace Milling Co. v. *Bondurant*, 257 U. S. 282;
Stafford v. *Wallace*, 258 U. S. 495;
Chicago Board of Trade v. *Olsan*, 262 U. S. 1.

(5) The effect of the Renovated Butter Act is to exclude State regulation of packing stock butter in interstate commerce without any express prohibition in the Federal legislation of State action, Congress having preempted and completely occupied the field with respect to that subject matter.

Prigg v. *Pennsylvania*, 16 Peters 539;
Oregon Wash. R. R. v. *Wash.*, 270 U. S. 87;
Napier v. *Atlantic Coast Line*, 272 U. S. 606;
Erie R. R. v. *New York*, 233 U. S. 671;
N. Y. C. R. R. v. *Winfield*, 244 U. S. 147;
Erie R. R. v. *Winfield*, 244 U. S. 170;
C. R. I. & P. R. R. v. *Hardwick Co.*, 226 U. S. 426;
Mo. Pac. Co. v. *Porter*, 273 U. S. 341.

Point C.

Where interstate and intrastate operations are necessarily indivisible and interstate operations are dominant the business must be considered as engaged in interstate commerce.

U. S. v. *Darby Lbr. Co.*, 61 Sup. Ct. 451;
Grandin Farmers Coop. Elevator Co. v. *Langer*, 292 U. S. 605, affirming 5 Fed. Supp. 425;

Shaffers v. *Farmers Grain Co.*, 268 U. S. 190;
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Currin v. *Wallace*, 306 U. S. 1.

Point D.

The Circuit Court of Appeals construed the Alabama Agricultural Code of 1927 contrary to the construction placed on that State Statute by the highest Court in the State.

State v. *Cecil*, 216 Ala. 391.

(1) The Circuit Court of Appeals should have followed the construction placed on the State Statute by the highest court in the State.

Erie R. R. v. *Tompkins*, 304 U. S. 64.

May it please the Court:

I.

The construction of the Renovated Butter Act is an important question of Federal law which has not been, but should be settled by this Court.

The Renovated Butter Act was enacted by Congress in 1902. It is found in the Act of May, 1902, Chapter 784, 32 Stat. 193, as amended, Title 26 U. S. C. A. Int. Rev. Code Sections 2320-2327, inclusive.

It is a special enactment relating to this particular industry.

It was adopted to remedy conditions existing at the time fully recognized by Congress as shown by testimony and discussions before the Committees and debates on the floors of both Houses. Congressional Record 57th Congress H. B. 9206, pages 1303, 1352, 1353, 1595, 1624, 1625, 1630, 1658. (Appendix 46, 47, 177, 178, 3241, 3242, 3271,

3272, 3277, 3278, 3279, 3282, 3283, 3316, 3317, 3321, 3454, 3549, 4586, 4587.) Senate Committee on Agriculture & Forestry Hearings February 17, 1902, 4, 5, 6, 7, 8, 9, 49, 50, 51, 52, 53.

The attention of Congress was directed particularly to the need of sanitary inspection and regulation of the industry and the materials entering into the manufactured product as well as the methods employed.

Prior to the passage of the 1902 Act, renovated butter plants were numerous—each a law unto itself as to sanitation. Naturally, there were many abuses, but notwithstanding, process butter and the raw material out of which it was made have always been recognized as legitimate articles of commerce. The Renovated Butter Industry supplies a market for country butter and also offers a wholesome product to the consumer cheaper than creamery butter.

To meet this situation; to provide and enforce rigid sanitary regulations; and to prevent deception, the Renovated Butter Act was passed in 1902, after much discussion and consideration and frequent amendments by Congress. Congress had already enacted laws covering the meat industry, packing plants, etc., in interstate commerce in great detail. The original renovated butter act refers to and adopts all of the applicable sanitary provisions of the then existing Meat Inspection Act. The last amendment of the Renovated Butter Act (August 18, 1912) extends all of the sanitary provisions and regulations of the later Meat Inspection Act to process or renovated butter factories.

By the original special enactment Congress fully took over and occupied the entire field in interstate commerce insofar as the manufacture and sale of renovated butter is concerned, and by the 1912 amendment referred to showed

its purpose and intention to completely and to continually occupy that field in interstate commerce.

The enforcement of these laws and the adoption of regulations to that end was and is committed to the United States Secretary of Agriculture and the Commissioner of Internal Revenue, and regulations have been promulgated from time to time providing, among other things, the complete inspection, regulation and control of the entire industry; including the raw materials used in the manufacture and the proper labeling of the finished product in interstate commerce.

As a matter of history, and as a practical proposition, only those plants that have been willing and able to meet the rigid Federal inspection and regulation have survived.

The plants that have stood the test, now operating in various States, have built a large business in interstate commerce—each operating under a Federal license and under the uniform laws of the United States, and the regulations which have been adopted by the Secretary of Agriculture and the Commissioner of Internal Revenue, having the force and effect of law, and applying alike to each plant engaged in the business. Under these laws and regulations each plant, together with the raw materials used in the manufacture, and also the finished product is made the subject of uniform inspection by the agents of the Secretary of Agriculture.

The record in this case shows that petitioner has built a large business in its 20 years operation, and is unable to supply the demand for its finished product.

The Alabama Statutes, under which the State officers claim authority to do the acts complained of, have been in existence since 1923. The practical construction given these Statutes by the State Department and the predecessors in office of the respondents was that their operation

was confined to intrastate commerce which is in harmony with a holding to the same effect by the highest court of the State in the case of *State* v. *Cecil,* 216 Ala. 391, decided April 7, 1927.

The Statutes of the State of Alabama recognize packing stock butter as the basis of the finished product. Alabama Agricultural Code, Sec. 71 (R. p. 17).

There are three matters of sweeping importance involved in this case:

1. The scope and effect of the Renovated Butter Act and the regulations promulgated pursuant thereto.

2. Whether or not, in order to exclude State regulation of the same article, Congress *must prohibit* State regulation of packing stock butter in interstate commerce for manufacture into process butter for sale and shipment in interstate commerce, where it affirmatively appears by Federal Statute that Congress has fully regulated the identical article in interstate commerce and provided an authority for determining its compliance or non-compliance with the Federal requirements.

3. Whether or not it is permissible for State officers to exercise jurisdiction at the same time over the identical subject matter, viz, packing stock butter in interstate commerce, over which Congress has already exercised its constitutional authority.

The purity of the finished product was not and could not be made an issue in this case, because the petitioner concedes the right of the State and its officers to proceed against any finished product *offered or kept for sale in Alabama,* but denies the right of respondents to seize or interfere with the raw material in interstate commerce, used in the manufacture of the finished product.

When it comes to interstate commerce, some authority must have the final word as to whether country or packing stock butter can be transported in interstate commerce for manufacture into renovated butter for sale and shipment in interstate commerce. The Constitution has committed this power to Congress.

Congress has exercised its authority and expressly authorized the renovation of such butter and its movement in interstate commerce. Congress has authorized the movement in interstate commerce of the finished product, as long as the United States Secretary of Agriculture determined that the finished product contains nothing unwholesome or deleterious to health.

The trouble petitioner complains of is this: While, by agreement, there is no difference in the standards prescribed by the State and the Federal Government, inasmuch as the State accepts the Federal standard, there is a marked difference in the way the officials of the two governments attempt to determine whether the standard of a wholesome, finished product has been met. Even if the methods were identical we would insist that the article in interstate commerce could not be subjected to duplicate and double inspection. Different methods are as objectionable and injurious as different standards.

If the State has the right to require the raw material out of which renovated butter is manufactured to be as pure and wholesome as the finished product, there is no need of renovation of the raw material.

The United States District Court recognizes that the most objectionable kind of packing stock butter may be renovated.

In the *9 Barrels of Butter case*, 241 Fed. 499, raw butter containing a substantial quantity of dirt, feathers, paper, aniline dyes, the excrement of rats, cheesey particles and a

substantial volume of rancid butter, was ordered renovated by the United States District Court.

The record in this case does not enable us to make a comparison of the butter seized by the respondents, with the butter involved in the *9 Barrels of Butter case*, but it is almost impossible to conceive of any butter being worse than the butter ordered renovated by the Federal District Court in that case.

The question of whether or not a State may prevent the production, within its borders, of impure food is not involved in this case.

Raw country butter or packing stock butter *is not a food* but raw material out of which a food is manufactured. The respondents have not seized the raw material because it is acquired, held, or offered, or exposed for sale *as food*, but they have seized the raw material because they claim the right to prevent, by seizure, the renovation of raw butter moving in interstate commerce, although the Renovated Butter Act, as construed by the Federal court, authorizes the renovation of such material. Such action necessarily sets aside the Act of Congress regulating renovated butter, and overturns the rule recognized by the Federal District Court in the case referred to.

Impure food is not a legitimate article of trade or commerce, but raw material, which contains impurities which can be manufactured into a pure and wholesome article of food by eliminating the impurities, is a legitimate article of commerce. Many examples might be cited such as copra, which is sun dried cocoanut in its filthiest and most objectionable form, out of which many edible oils and salad dressings are made.

Congress *has not prohibited* the movement of packing stock butter in interstate commerce for manufacture into pure and wholesome process butter for sale and shipment in interstate commerce. *Congress has prohibited the move-*

ment of deleterious or unwholesome process butter in interstate commerce. In the matter of renovated butter, Congress has regulated the raw material, the finished product, and its manufacture from beginning to end.

We concede the right of every State to inspect and seize any finished product offered for sale in its jurisdiction, which contains anything deleterious to health. We also concede the right of the Secretary of Agriculture of the United States *to inspect* raw butter in interstate commerce.

The main purpose of the Renovated Butter Act was:

> "To provide for the sanitary inspection of such butter at the place of manufacture, and to take every precaution in order that none shall be shipped from the factory which, can, in any way, be injurious to the health of the consumer."
>
> *U. S.* v. *Bohl*, 125 Fed. 625.

When Congress imposed the duty on the Secretary of Agriculture of the United States to inspect the raw material in interstate commerce it excluded State inspection and seizure as long as the raw material is in interstate commerce. We insist that State officers have no right or authority to seize raw material, in interstate commerce, *in advance of its renovation*, and by seizure and confiscation prevent it being renovated and manufactured into a desirable commodity.

The authority of the Federal Government to inspect the materials used in the manufacture of butter can hardly be questioned. It may inspect the materials *before* or *after* manufacture. If the State may exercise the same authority over the identical subject matter, who would decide the issue in case of conflict?

The United States Secretary of Agriculture may do any one of several things if, upon inspection, the raw material is deemed objectionable. He may (1) set it aside and put the burden on the manufacturer of going to court and ob-

taining a court order for its renovation. (2) He may file a libel against it and condemn it if it is unfit for renovation. (3) He may order it separately renovated, and analyze and examine the finished product, and condemn it, if it contains any deleterious or unwholesome matter.

Whether he does any or all of them he must ascertain the condition of the finished product,

> "and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment, he shall have power to confiscate the same."
>
> Section 995, U. S. C. A., Title 26.

Any danger to the public is in the finished product. The United States Secretary of Agriculture is required to remove that danger by confiscating any finished product containing anything unwholesome or deleterious to health.

The majority opinion of the Circuit Court of Appeals recognizes the right of the Federal Government under the Renovated Butter Act to inspect packing stock butter in interstate commerce. But, it holds, in effect, that the State may do the same thing, because it says, Congress *has not prohibited* State regulation, and the Federal Government has not seized the article in question.

The majority plants its opinion on the proposition that the State may seize packing stock butter moving in interstate commerce, until Congress prohibits State regulation or until the Federal Government inspects and passes the article involved.

Our form of Government does not contemplate a twilight zone where a race between the State and Federal officials will result in the sovereignty which gets there "fust with the mostes men" ousting the other sovereignty. It does not contemplate a race between State and Federal officials

in order to see which one may exclude the other from jurisdiction over subject matter in interstate commerce. State inspection of raw material in interstate commerce is excluded by Federal Legislation providing Federal inspection of the same material. *Both are not needed.*

It seems to us that it is unnecessary to cite authority to support the proposition that the respondents are imposing an intolerable burden on interstate commerce by seizing raw material in interstate commerce before delivery to its destination, thereby interfering with the continuity of the shipment and also seizing raw material after its delivery but in the course of manufacture into process butter for sale or shipment in interstate commerce.

Certainly Congress has authorized the United States Secretary of Agriculture to inspect the raw material *in interstate commerce* and to determine the wholesomeness and purity of the finished product *in interstate commerce.* There is no warrant for respondents usurping his authority or undertaking to perform his duty.

There is another reason why the Renovated Butter Act should be construed as showing on its face that Congress preempted the field as to raw material in interstate commerce for manufacture of process butter for sale and shipment in interstate commerce.

In Section 1 of the Renovated Butter Act Congress made the finished product subject to the laws of a State whenever the finished product is introduced into the State for use, consumption, sale or storage therein.

Congress, however, did not make raw material moving in interstate commerce for manufacture into process butter subject to State laws. As long as the raw material is in the stream or channel of interstate commerce it is under Federal and not State jurisdiction. The Circuit Court of Appeals took cognizance of the fact that Congress did not in terms make packing stock butter in interstate commerce

subject to State laws. But the majority claim in effect that the expressed intention of Congress to make the finished product subject to State laws on arrival in the State is evidence of an unexpressed Congressional intent to make the raw material *in interstate commerce* subject to State law upon its arrival in the State.

There are numerous reasons why Congress might exempt the raw material in interstate commerce from the operation of State law, and subject the finished product to the operation of State law when its interstate movement ended and it reached its final destination.

Had Congress intended to subject the raw material in interstate commerce to the operation of State laws it would have said so, as it did in the case of the finished product and not left the court in a state of doubt and uncertainty as to its purpose.

When Congress required the Secretary of Agriculture to inspect the materials going into the manufacture of process butter it was thoroughly aware that State inspection laws could not operate on the subject which Congress assumed jurisdiction over. The raw material is in the stream of interstate commerce from the time it is purchased until it is manufactured into the finished product.

Currin v. *Wallace*, 306 U. S. 1;

Dahnke-Wallace Milling Co. v. *Bondurant*, 257 U. S. 282;

Stafford v. *Wallace*, 258 U. S. 495;

Chicago Board of Trade v. *Olsan*, 262 U. S. 1.

It was entirely unnecessary for Congress to subject raw material in interstate commerce to the operation of State law. The process of manufacture from the time the raw material is acquired through its conversion into the finished product and delivery to final destination is in interstate

commerce. The interests of the State are abundantly taken care of when the finished product is made subject to the operation of State law when its interstate journey is at an end for the obvious reason that the public is not menaced or endangered by the raw material. The condition of the finished product at the time it reaches the consumer determines its danger *vel non* to the public health. It is most unusual for Congress to authorize a State to interrupt the orderly course of interstate commerce when Congress itself has taken the subject in hand. If the finished product is as pure and wholesome as Federal Legislation requires it to be before it can be delivered in interstate commerce there is no danger to the public health from the raw material used in its manufacture.

Congress left it to the several States to take whatever action they might see fit with respect to the finished product after its movement in interstate commerce ceased. Congress had no way of knowing what States might or might not act to restrict the use of the finished product. For that reason Congress made the finished product subject to the operation of State laws leaving each State free to legislate with respect to the finished product. At the same time, Congress had no desire to, or reason for, destroying the renovated butter business and with it the little farmer's most dependable market for raw country butter. Congress, therefore, undertook a regulation of the business by taking over the field of inspection of the raw material in interstate commerce, as well as the examination and inspection of the finished product, and adopted suitable measures, to insure the purity of the finished product and in that way establish a uniform standard throughout the country.

The title of the Renovated Butter Act, Fed. Stat. Ann. Vol. 3, page 127, shows that one of the expressed purposes of the Act was "to regulate the manufacture" of dairy

products. This apparently escaped the attention of the majority of the Circuit Court of Appeals. Even Congressional action making process butter subject to the operation of State law upon its introduction into the State does not authorize the State to interfere with the continuity of an interstate shipment of process butter. Such shipment must proceed until it reaches the consignee.

Rhodes v. *State of Iowa*, 170 U. S. 412.

In view of that well-established rule we are unable to discover any basis for a contention that the State may interfere with the continuity of an interstate shipment of raw material. If the State cannot interfere with the continuity of an interstate shipment of finished product which is expressly subjected to the operation of State law as soon as it is delivered to the consignee it is difficult to understand how it can be claimed that the State may interfere with the continuity of an interstate shipment of raw material before it is delivered to the consignee when it has not been expressly subjected to the operation of State law.

The language in Section 1 of the Renovated Butter Act is identical with the terms of the Wilson Bill, 26 Stat. at Large, 313, Chap. 728, construed in the *Rhodes* case, *supra*. The provision making the finished product subject to the operation of State law upon its introduction into the State merely enables the State to avoid the operation of the original package doctrine, after the commodity's transportation is completed.

The majority opinion of the Circuit Court of Appeals leaves the true meaning of the Renovated Butter Act and relating acts in doubt and uncertainty as well as the rights of the petitioner under it, and the authority of the Secretary of Agriculture of the United States in performing the duty imposed on him by Congress.

II.

The Court of Appeals decided an important question of Federal law very probably in conflict with applicable decisions of this Court.

(a) Congress has preempted the field of inspection of raw material in interstate commerce going into the manufacture of process butter for sale and shipment in interstate commerce, and the Circuit Court of Appeals erred in holding otherwise.

The question of whether or not Congress has preempted and completely occupied the field of inspection and regulation of the raw material in interstate commerce going into the manufacture of process butter for sale and shipment in interstate commerce, necessarily calls for a construction of the Acts of Congress known as the Renovated Butter Act. It may be appropriately asked: What has Congress done about this matter? The answer is found in the Federal Statutes and the regulations promulgated by the Secretary of Agriculture of the United States pursuant to the Acts of Congress.

In Section 5 of the Act of 1902, now Section 2325, I. R. C., it is provided:

> "The *Secretary of Agriculture is* authorized and *required to cause a rigid sanitary inspection to be made*, at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, * * * and *of all the* products thereof and *materials going into the manufacture of the same* * * *. The Secretary of Agriculture shall make all needful regulations for carrying this section and sections 2326 (c) and 2327 (b) into effect and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which

it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same." (Emphasis supplied.)

In addition to the sweeping and comprehensive power vested in the Secretary of Agriculture by the provision quoted, Section 4 of the original Act, now Section 2322, I. R. C., *requires every manufacturer* of process or renovated butter *to conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of Agriculture, may by regulation require.*

Pursuant to the express mandate in Section 2325 I. R. C. the most comprehensive regulations relating to both raw material and finished product have been promulgated by lawful authority. The first regulation is found in Regulation No. 9 issued by the Treasury Department, revised April, 1936. Paragraph (d) of these Regulations reads:

"(d) *Deleterious products seizable.*—The Secretary of Agriculture will determine whether or not *materials being used in the manufacture of process* or renovated *butter* will be deleterious to health or unwholesome *in the finished product.* If any materials which have been so determined to be deleterious to health or unwholesome *in the finished product* are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated." (Emphasis supplied.)

The next regulations are found in Order No. 1, Bureau of Dairy Industry, revised December 24, 1936, and pro-

mulgated by the Secretary of Agriculture on that date. These regulations minutely and in detail cover every possible phase of the manufacture of process butter for sale and shipment in interstate commerce. The regulations are set out in the Appendix but we will indulge in a brief review of them at this time:

In Regulation 1 it is provided that the chief of the Bureau of Dairy Industry is charged, under the direction of the Secretary of Agriculture, with the administration of these regulations.

Section 1 of Regulation 3 provides for rigid sanitary inspections as often as necessary of all process or renovated butter factories and storehouses where process or renovated butter is manufactured, packed or prepared for market.

Section 3 requires all such places to be maintained in a sanitary condition.

Section 4 requires them to be suitably lighted, screened and ventilated, supplied with proper and sufficient drainage and kept free from steam and other vapors.

Section 5 requires floors, ceilings, walls, partitions, platforms, stairways, etc., to be kept in a sanitary condition.

Section 6 requires all utensils used in the manufacture of processed butter to be kept in a sanitary condition.

Section 7 requires sanitary pumps, pipes and fittings.

Section 8 requires clean employees and clean outer clothing.

Section 9 prohibits the employment of any person afflicted with a communicable disease in a process or renovated butter factory, and requires a report of any employee suspected of being so affected.

Section 10 requires modern plumbing in compartments completely separated from the compartments in which process or renovated butter is prepared, packed, stored or otherwise handled.

Section 11 requires the factory to be kept free from odors, flies and other vermin.

Section 1 of Regulation 4 provides:

> "Rigid sanitary inspections *will also be made of the character and condition of the materials going into the manufacture of processed or renovated butter* and all quantities and qualities of processed or renovated butter manufactured."

Section 2 prohibits the use of any butter that has come in contact with the floor.

Section 3 requires good, clean and wholesome water and ice to be used.

Section 4 requires pure air to be taken from outside the building, which must be filtered.

Section 5 requires cream, milk and skimmed milk to be pasturized.

Sections 6 and 7 require all other materials entering into the manufacture of processed or renovated butter to be kept stored and handled in a sanitary manner, as well as containers used for packing processed or renovated butter.

Regulation No. 5 relates to the labeling and branding of processed or renovated butter.

Regulation No. 6 relates to reports.

Regulation No. 7, Section 1, provides:

> "Section 1. *To determine whether or not materials used in the manufacture of processed* or renovated *butter are deleterious to health or unwholesome in the finished product*, a sample of such processed butter shall be taken.
>
> "Section 2. Such sample shall be drawn in the following manner: A sample will be taken from every package of each lot. However, (A) if a lot includes two or more packages from one churning, a sample may be taken from one package only; or (B) if the separate churnings are not indicated, not less than one sample

from each 10 tubs may be taken. Additional samples may be taken if, in the opinion of the inspector, such action is necessary to obtain representative samples of such butter."

Section 3 provides for the transmission of the samples to the department for examination and chemical analysis.

Section 4 provides for the confiscation of any butter deleterious to health or unwholesome in the finished product, with the provision that the Secretary of Agriculture may release such butter to its owner for industrial use under such conditions as he determines are necessary to prevent its use for food purposes.

That there might be no question as to the plenary authority of the United States Secretary of Agriculture to completely regulate every detail of the manufacture of process butter, including the determination of the suitability of the raw materials employed, which was considered essential to the protection of the public health, Congress extended the sanitary provisions of the meat inspection laws to process or renovated butter factories and again authorized the Secretary to prescribe needful regulations.

For nearly 35 years these meat inspection laws have been considered as evidencing the purpose of Congress to fully occupy and cover that field and to exercise its authority for the insurance of the purity of those finished products to be sold in interstate commerce.

It will be noted that the Regulations for carrying out the Renovated Butter Act as promulgated by the Secretary of Agriculture and the Commissioner of Internal Revenue are predicated upon these laws as well as the original Act of 1902.

There are a number of other provisions in the regulations which are set out in the Appendix, which show how completely Congress has occupied the field of inspection

and regulation, but we do not deem it necessary to set them out at this time.

When the Federal Statutes and regulations are considered, one is naturally confronted with this question: *What more could Congress do than it has done to exclusively occupy the field of inspection and regulation of raw materials in interstate commerce going into the manufacture of process or renovated butter for sale and shipment in interstate commerce; or what may the State of Alabama do in the way of inspection of raw material in interstate commerce going into the manufacture of process or renovated butter for sale and shipment in interstate commerce, that the Secretary of Agriculture is not required to do by the Federal law and the regulations promulgated pursuant thereto which have the force and effect of law?*

If there is anything else that Congress and the Secretary of Agriculture could do in order to preempt and completely occupy the field as to the manufacture of process butter for sale and shipment in interstate commerce, it has not been suggested by the very able Attorney General who represents the Appellees. It has not occurred to us; neither was it mentioned by the Circuit Court of Appeals. The cold, inescapable fact is that there is not a single thing that the State of Alabama can do with reference to packing stock butter in interstate commerce that it is not the duty of the Secretary of Agriculture of the United States to do. The Secretary of Agriculture of the United States has full and complete authority to examine packing stock butter before it is manufactured into renovated butter. He may examine the finished product for the purpose of determining whether the raw material out of which it was manufactured was fit or suitable for that purpose.

The manufacturer is required to conduct his business under such surveillance as the Secretary of Agriculture of the United States may by regulations require. The regu-

lations affirmatively show that Congress has taken possession of the field of regulating and inspecting raw materials in interstate commerce going into the manufacture of process or renovated butter for sale and shipment in interstate commerce. There is no part of the field that the State can occupy without infringing upon the authority vested in the Secretary of Agriculture. There is nothing that the State of Alabama or its officers may do in this field that the Secretary of Agriculture of the United States is not required to do by Federal law and the regulations promulgated pursuant thereto.

First through the Bureau of Animal Industry, but for the past many years, the Secretary of Agriculture, through the Bureau of Dairying, has occupied the field. No State officer in any other State, so far as we have been able to learn, has ever been so bold as to challenge the authority of this well-equipped, highly trained and extremely efficient department, to execute the Renovated Butter Act. Alabama officers, reversing the custom and practice of twenty years, acting under color of their office, have lately entered this field and exercised control and authority over raw materials in interstate commerce. In fact the unchallenged, verified bill shows that the last seizure complained of was a truck loaded with raw butter that was moving in interstate commerce from Georgia to Alabama.

Sections 1 and 2 of Regulation 7 prescribe a method for determining whether or not materials used in the manufacture of process butter are deleterious to health or unwholesome in the finished product.

The respondent state officers are not satisfied with the method prescribed by the regulations promulgated by the Secretary of Agriculture. They are not content to allow the Bureau of Dairying to determine whether or not materials moving in interstate commerce for manufacture into process and renovated butter are deleterious to health

or unwholesome in the finished product. They claim the right in themselves to determine whether raw material in interstate commerce for manufacture into process butter for sale and shipment in interstate commerce, is deleterious or unwholesome.

The least that can be said of it is Congress has certainly occupied the field to the extent of requiring the Secretary of Agriculture to determine the suitability of packing stock butter in interstate commerce going into the manufacture of process butter for sale and shipment in interstate commerce, and the Secretary of Agriculture has prescribed a method for determining whether or not materials used in the manufacture of process butter are deleterious to health or unwholesome.

The Renovated Butter Act and the Regulations promulgated pursuant thereto are certainly not less comprehensive with respect to the subject matter here involved than the Interstate Commerce Commission Act, Employers Liability Act, U. S. C. A., Title 45, Section 51-58, Hours of Service Act, U. S. C. A., Title 45, Section 61-66, Locomotive Boiler Inspection Act, U. S. C. A., Title 45, Section 22-34, The Quarantine Act (Sec. 8 of the Act of Aug. 20, 1912, as amended by Agricultural Appropriation Act of Mar. 4, 1917), Carmack Amendment, U. S. C. A., Title 49, Sec. 20, are with respect to the matter there involved. In each instance those Acts were held to evidence a Congressional intention to take over and completely occupy the field involved.

Nor. Pac. v. *Wash.*, 222 Wash. 370 (Hours of Service);

Napier v. *Atlantic Coast Line*, 272 U. S. 606 (Boiler Inspection);

Oregon-Wash. R. R. v. *Wash.*, 270 U. S. 87 (Quarantine);

So. Ry. v. *Reid*, 222 U. S. 424 (Hepburn Act);

Mo. Pac. R. R. v. *Stroud*, 267 U. S. 404 (I. C. C. Act);
L. & N. R. R. v. *State*, 16 Ala. App. 199 (I. C. C. Act).

These cases require a like result in the construction of the Renovated Butter Act.

THE MEAT INSPECTION ACT.

The fact that Congress, by express words, made the meat inspection act with all of its drastic provisions for aiding government agents in determining the suitability of raw material (cattle, hogs and sheep) as well as the finished product (beef, pork and mutton) applicable to the renovated butter industry, is highly persuasive that Congress intended to preempt the field of inspection of raw material in interstate commerce.

If the respondents are at liberty to seize raw butter in interstate commerce, going into the manufacture of process butter for sale and shipment in interstate commerce, does it not logically follow that they may also seize raw material—cattle, hogs and sheep—in interstate commerce, going into the manufacture of beef, pork and mutton products for sale and shipment in interstate commerce?

The Constitution, by vesting exclusive control in Congress over interstate commerce, exempted a legitimate article of interstate commerce from the burden of two inspections, State and Federal, where the aim, object and purpose of each inspection is the same. Congress intended to completely occupy the field of this subject matter and it has actually occupied it as completely as the English language allows.

THE SMALL FARMER.

The only regular, dependable market the small farmer has for the kind of butter he can produce under the conditions under which he must live is the renovated butter fac-

tory. Big dairies and creameries market butter under a name, and a label that satisfies the consumer of the purity and safety of the product. Oleomargarine, renovated butter and other forms of butter manufactured must be stamped and labeled as the Government requires. The label on it serves the same purpose with the consumer. The public has been educated to purchase butter that carries a label or stamp. The housewife will no longer buy butter that is produced under conditions she knows not what. Unless the little farmer can sell his butter to a renovating plant, where his product is cleaned up, reworked, standardized and labeled as the Federal law requires he is, practically speaking, without a market for his unidentified and unlabeled product.

THE EFFECT OF THE FEDERAL LAW.

In the majority opinion of the Circuit Court of Appeals it is said:

> "They (cases relied on by Appellee) establish the doctrine that state officers enforcing by seizure police regulations with regard to foods, will not be enjoined at the suit of persons complaining of them merely because there exist similar federal laws and regulations in respect to the same subject matter and there has been no federal seizure."

But the opinion does not cite the cases it says establish the alleged doctrine.

As opposed to the novel doctrine that both the State and the United States may exercise jurisdiction at the same time over the same subject matter, we would say as this court has said:

> "Commerce cannot flourish in the midst of such embarrassments."
>
> *Hall* v. *DeCuir*, 95 U. S. 485.

"Insofar as direct regulation of commerce is concerned, the power of Congress is wholly exclusive, and is not divisible into exclusive and non-exclusive parts."
15 C. J. S. Sec. 13, p. 270.

"There is scarcely a detail of regulation which is omitted to secure the purpose to which the Interstate Commerce Act is aimed."

And the same is true of the Renovated Butter Act and the regulations promulgated pursuant to it.

"It is true that words directly inhibitive of the exercise of state authority are not employed, *but the subject is taken possession of.*" (Emphasis supplied.)
Southern R. Co. v. *Reid*, 222 U. S. 424-442.

"It is also urged that, even if the Commission has power to prescribe an automatic fire box door and a cab curtain, *it has not done so;* and that *it has made no other requirement inconsistent with the State legislation.* This, also, if true, is without legal significance. *The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power.* (Emphasis supplied.)

* * * * * * *

"If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample."

Napier v. *Atlantic Coast Line*, 272 U. S. 606.

Apply that case to the case at bar. The power delegated to the Secretary of Agriculture of the United States is a general one. He prescribes the rules and regulations by which the fitness of the raw material is determined. The federal law and the state action are directed to the same subject—renovated butter. The broad scope of the authority conferred on the Secretary of Agriculture of the

United States leads to the conclusion that state legislation is precluded. The fact, if it be a fact, that the secretary of Agriculture has not seen fit to exercise his authority to the full extent has no bearing upon the construction of the renovated butter act. If the protection now afforded by the regulations promulgated by the Secretary of Agriculture of the United States is deemed inadequate, application for relief must be made to him.

It would seem unnecessary to go any further than the *Napier* case. It answers every contention adversely to respondents.

> "It is suggested that the States may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the States to quarantine, and that if he does not act there is no invalidity in the state action. Such construction as that can not be given to the federal statute. The obligation to act without respect to the States is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the federal law in force, state action is illegal and unwarranted."
> *Oregon-Wash. R. R.* v. *Washington*, 270 U. S. 87.

The obligation to act on raw material and finished product in interstate commerce is put directly upon the Secretary of Agriculture. With the Federal law in force, State action is illegal and unwarranted. Congress and the Secretary of Agriculture have decided how deleteriousness or unwholesomeness in raw material, in interstate commerce, going into the manufacture of the finished product for sale and shipment in interstate commerce is to be determined. That excludes any like action by the State.

Our position is supported by *Nor. Pac. Ry.* v. *Washington*, 222 U. S. 370. There Congress passed an "Hours of Service Law," which was to become effective one year after

its passage. During that pre-effective year Washington passed a State "Hours of Service Law." It was claimed the State law might operate during the time Congressional action was not operating.

Chief Justice White, speaking for the Court, said:

> "It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. * * * To admit the fundamental principle and yet to reason that because Congress chose to make its prohibitions take effect only after a year, the matter with which Congress dealt remained subject to state power, is to cause the act of Congress to destroy itself; that is, to give effect to the will of Congress as embodied in the postponing provision for the purpose of overriding and rendering ineffective the expression of the will of Congress to bring the subject within its control—a manifestation arising from the mere fact of the enactment of the statute.
>
> * * * * * * *
>
> "But if we pass these considerations and consider the issue before us as one requiring merely an interpretation of the statute, we are of opinion that it becomes manifest that it would cause the statute to destroy itself to give to the clause postponing its operation for one year the meaning which must be affixed to it in order to hold that during the year of postponement State police laws applied."
>
> * * * * * * *

To like effect are:

L. & N. R. R. Co. v. *State*, 16 Ala. App. 199, Supreme Court opinion at page 204.

Prigg v. *Pa.*, 16 Peters 539.

Erie R. R. v. *New York*, 233 U. S. 671.
N. Y. C. R. R. v. *Winfield*, 244 U. S. 147.
Erie R. R. v. *Winfield*, 244 U. S. 170.
C. R. I. & P. R. R. v. *Hardwick Co.*, 226 U. S. 426.
Mo. Pac. Co. v. *Porter*, 273 U. S. 341.
Farmers Grain Co. v. *Langer*, 273 Fed. 635.

The Circuit Court of Appeals has in effect held that the Secretary of Agriculture has determined that raw material in interstate commerce should not be seized, and that *his determination that it should not be seized*, leaves the *respondents* free to *determine that it should be seized.*

If the Secretary of Agriculture is willing to give the industry an opportunity to clean up packing stock butter in interstate commerce, and to manufacture a wholesome article from it, by what right can that plan for regulation *in interstate* commerce be vetoed by respondents? In *Prigg* v. *The Commonwealth of Pa.*, 16 Pet. 539, it was said:

> "For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it. * * *"

The record shows, and the opinion of the Court of Appeals recognizes, that the State regulations the respondents claim they are enforcing have exactly the same objective as the Renovated Butter Act and the regulations of the Secretary of Agriculture. Both are trying to accomplish the same thing.

Water we drink is filtered before it reaches us for the express purpose of eliminating all objectionable matter in the water. As long as it is pure it matters but little whether its source is a spring or contaminated stream or pool. The thing that affects health is the condition of the water at the time it is delivered to the consumer.

The Secretary of Agriculture has adopted a practical method for protecting the public health, viz: the condition of the finished product.

There is no rational basis for the contention that the Secretary of Agriculture's failure to seize raw material in interstate commerce leaves State officers free to exercise any authority over the same subject matter.

In the opinion written by Judge Hutcheson of the United States Circuit Court of Appeals for the Fifth Circuit it is said:

> "It is not claimed that the State and Federal standards are in conflict. It is not even claimed that the Federal Government has actually inspected and passed the particular products the State has seized."

That is true. It may be that the raw material was seized by the State officers before the Federal authorities had any opportunity to inspect it. However, that is unimportant. Congress has set a standard for the raw material, and imposed a duty on the United States Secretary of Agriculture to make a "rigid sanitary inspection" of it, thereby excluding State inspection and rendering it unnecessary. If the Secretary of Agriculture decides against seizure of raw material before it is processed, his action is not subject to revision by respondents.

The standard prescribed by Congress and the United States Secretary of Agriculture is that raw material must not be deleterious to health or unwholesome *in the finished product*. The standard fixed by Congress does not reject

raw material deleterious or unwholesome, *in its then condition;* it must not be deleterious or unwholesome *in the finished product.* It is stipulated that the State standard is the same as the standard prescribed by Congress.

We say, therefore, that we have a Federal law completely covering every phase of the manufacture of process butter for sale and shipment in interstate commerce. It covers the raw material; it covers the method of operating the industry; it covers the industry; it covers the finished product; it covers the entire business in the most minute detail.

But, says the Court of Appeals, this is not sufficient to show that Congress has preempted and completely occupied the field. "It must appear that there is in effect an *express prohibition against State regulation,* or that there is such an essential conflict between State and Federal laws and regulations as that compliance with the one is defiance of the other, and therefore *a prohibition against State regulation* must be implied." And the court is apparently of the opinion that its announced conclusion finds support in the case cited on page 232 of the opinion in the Federal Reporter. We insist that the cases cited have been misinterpreted and misapplied.

Mintz v. *Baldwin,* 289 U. S. 346.

Suit to restrain State enforcing regulation prohibiting the importation of cattle into New York unless the cattle and the herds from which they came were certified free from Bang's disease by the chief sanitary official of the State of origin.

> "Plaintiff shipped 20 head from Wisconsin for delivery to one Bartlett in New York. The animals were accompanied by a certificate which was sufficient as to them, but there was nothing to show the freedom from Bang's disease of the herd or herds from which they came. For that reason defendant refused to permit

them to be delivered, and so plaintiffs were compelled to take them out of New York." (Page 348.)

"The Federal Department of Agriculture, November 15, 1932, by letter to defendant declared that the *Department had issued no quarantine or regulation pertaining to Bang's disease and that its policy for the present is to leave the control with the various States.*" (Italics supplied.) (Page 349.)

"Whenever any inspector or assistant inspector of the Bureau of Animal Industry shall issue a certificate showing that such officer had inspected any cattle which were about to be shipped * * * from such locality * * * and had found them free from * * * communicable disease, such animals, so inspected and certified, may be shipped, driven, or transported from such place in interstate commerce without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture. * * *" (Pp. 350-351.)

"The express exclusion of State inspection extends only to cases where Federal inspection has been made and certificate issued. The clause cannot be read to extend to other cases. The expression of purpose so to limit the exertion of State power strongly suggests that Congress intended not otherwise to trammel the enforcement of state quarantine measures." (Page 351.)

Pacific States Co. v. *White*, 296 U. S. 176:

Suit to enjoin State order prescribing standards for containers in which berries were marketed.

"*The standard prescribed by the order does not conflict with any established by Congress.* The Standard Baskets and Containers Act of May 21, 1928, c. 664, 45 Stat. 685, has no relation to the matter here under consideration. That statute deals solely with hampers, round stave, and splint baskets of capacity not less than one-eighth bushel. The Standard Baskets and Containers Act of August 31, 1916, c. 426, 39 Stat. 673, which in Sec. 2 deals with containers for small fruits and vegetables, prescribes merely the capacity of the

containers. It fixes the cubic feet contents for dry half-pint, pint and quart. It makes no reference to the dimensions or form of the container; and has left to the individual States the adoption of the standards in these respects if deemed necessary." (Page 182-183.)

Kelly v. *Washington*, 302 U. S. 1:

"Respondents, owners of motor-driven tugs, sought a writ of prohibition to prevent the enforcement of provisions of c. 200 of the Washington Laws of 1907 (Rem. Rev. Stat., Secs. 9843 et seq.) relating to the inspection and regulation of vessels. (Page 2-3.)

* * * * * * *

"*There is no constitutional rule which compels Congress to occupy the whole field.* Congress may circumscribe its regulation and occupy only a limited field. When it does so, State regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid, if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'. (Page 10.)

* * * * * * *

"*In the instant case, in relation to the inspection of the hull and machinery of respondents' tugs, the State law touches that which the Federal laws and regulations have left untouched.* (Page 13.)

* * * * * * *

"We have found that in relation to the inspection of the hull and machinery of these tugs, in order to insure safety and seaworthiness, there is a field in which the State law could operate without coming into conflict with present Federal laws." (Page 15.)

Which very clearly shows that the subject was not completely covered by Federal laws and regulations.

S. C. Highway Dept. v. *Barnwell Bros.*, 303 U. S. 177:

Suit to enjoin State officers from enforcing State statute limiting weight and width of trucks on public roads while engaged in interstate commerce.

> "Appellees do not challenge here the ruling of the district court that *Congress has not undertaken to regulate the weight and size of motor vehicles in interstate motor traffic*, and has left undisturbed whatever authority in that regard the States have retained under the Constitution. (Page 184.)
>
> "But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the State to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate." (Page 187.)

These quotations make it clear that the case turned on the proposition that Congress had not acted on the subject involved.

Currin v. *Wallace*, 306 U. S. 1:

Suit to declare Tobacco Inspection Act unconstitutional. It was claimed it was a regulation of intrastate commerce.

> "The Act states its scope and purpose. Sections 1, 2. It applies to transactions involving the sale of tobacco at auction as commonly conducted at auction markets. These transactions are carried on by tobacco producers and by persons engaged in the business of buying and selling tobacco in commerce as defined, that is, in commerce which is interstate or foreign or is with or within the Territories or the District of Columbia. Congress finds that the classification of

tobacco according to type, grade, and other characteristics affects the prices received; that 'without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation and control,' and 'unreasonable fluctuations in prices and quality discriminations occur,' constituting a burden upon commerce; and that the use of uniform standards is imperative 'for the protection of producers and others engaged in commerce and the public interest therein.' (Page 5-6.)

* * * * * * *

"Under the operation of the Act Federal inspectors examine the tobacco about an hour before the sale. They pull samples from each pile and place tickets indicating the grade. Each day there is displayed in the warehouse a report indicating the average price for the government grades sold on the previous day and weekly reports are issued for the preceding week. (Page 8.)

* * * * * * *

"Inspection and the establishment of standards for commodities has been regarded from colonial days as appropriate to the regulation of trade, and the authority of the States to enact inspection laws is recognized by the Constitution. Art. 1, Sec. 10, par. 2. See Turner *v.* Maryland, 107 U. S. 38, 51-54; Pacific States Co. *v.* White, 296 U. S. 176, 181. *But the inspection laws of a State relating to exports or to articles purchased for shipment to other States are subject to the paramount regulatory power of Congress.*" (Page 12.) (Emphasis supplied.)

This case supports the contention of Appellant. It was there held that the tobacco involved was in interstate commerce and congressional action respecting it was paramount.

Townsend v. *Yeomans*, 301 U. S. 454:

Suit to restrain the enforcement of a statute of Georgia fixing maximum charges for handling and selling leaf tobacco.

> "The statute was assailed as an arbitrary and capricious exercise of State power, repugnant to the Fourteenth Amendment of the Federal Constitution, and as placing a direct burden upon interstate commerce in violation of the commerce clause." (Page 443.)
>
> "Unless there is conflict with the authority of the Congress over interstate commerce, the enactment of the statute was clearly within the competency of the Georgia legislature. (Page 449.)
>
> "The main contention of appellants is that the State had no power to enact the regulation as it attempted to govern transactions in the course of interstate and foreign commerce. (Page 452.)
>
> "We find it unnecessary to pass upon the authority of the Congress to regulate the charges of the warehousemen, for we are of the opinion that, if it be assumed that Congress has that authority, *it has not been exercised and in the absence of such exercise the State may impose* the regulation in question for the protection of its people. (Page 452.) (Emphasis supplied.)
>
> "The State is entitled to afford its industry this measure of protection until its requirement is superseded by valid Federal regulation." (Page 459.)

This case turns on the proposition that Congress had not exercised its authority.

In this connection we submit it is not necessary for the Federal Government to seize packing stock butter in order to exercise jurisdiction over it. If the Government requires inspection and prescribes a method by which it may be ascertained whether the packing stock butter measures up to a given standard, that, we submit, is as much an exercise of jurisdiction over packing stock butter as is a seizure of the butter itself.

We know of no authority holding that the State may duplicate the work of the Federal Government.

Under the Renovated Butter Act the Secretary of Agriculture is at liberty to examine raw material for the purpose of determining whether it will be deleterious to health or unwholesome in the finished product. He is likewise at liberty to examine the finished product in order to ascertain whether the raw material which went into its manufacture is deleterious to health or unwholesome in the finished product.

In other words, for the purpose of determining whether the raw material in interstate commerce conforms to the standard prescribed by Congress the Secretary of Agriculture may examine the raw material *before* or *after* it is processed. The method by which he ascertains whether there is anything in the finished product that is deleterious to health or unwholesome is left exclusively to him. This indicates that Congress intended to invest him with flexible authority sufficient to meet any situation that might arise. It also indicates that Congress intended to exercise the strictest possible control over renovated butter in interstate commerce. The fact, if it be a fact, that the Secretary of Agriculture has decided that an examination of the finished product is the best method for determining whether or not the raw material that went into its manufacture is deleterious or unwholesome in the finished product, affords neither justification nor excuse for the respondent State officers undertaking *to do* in a *different* way exactly the some thing that the Secretary of Agriculture is required to do by a method which he has approved.

It is not necessary for this Petitioner to show that the Federal Government has actually inspected and passed the particular products the State has seized. It is only necessary for the Petitioner to show that the Federal Govern-

ment has provided for inspecting and passing the particular products the State has seized and directed a particular officer to perform that duty. When it is shown that the Federal Government has prescribed a standard for the products the State has seized and that it has required those products to be inspected for the purpose of determining whether or not they meet the standard prescribed by Congress, State action in the premises is excluded.

It is not a question of whether the Secretary of Agriculture has acted. If the inspection of the raw material in interstate commerce is within the scope of the authority vested in him by the Renovated Butter Act, State action is excluded.

(c) The "compliance-defiance" test, announced in the majority of opinion, is not compatible with the paramount power of Congress over interstate commerce.

A majority of the Circuit Court of Appeals laid down the rule that in order to obtain relief from the enforcement of State police regulations upon the claim that Federal regulations have preempted the field—

> "It must appear that there is in effect an express prohibition against State regulations or that there is such an essential conflict between State and Federal laws and regulations as that compliance with the one is defiance of the other and, therefore, a prohibition against State regulations must be implied."

Let's examine the "compliance-defiance" test. It was rejected in *Erie R. R. Co.* v. *New York*, 233 U. S. 671, *on the ground that it was not compatible with the paramount power of Congress over interstate commerce.* It was there pointed out that the New York Court of Appeals sustained the statute because it found that:

> "The State has simply supplemented the action of the Federal authorities • • • and the form of the

Federal statute * * * fairly seems to have invited and to have left the subject open for supplemental State legislation if necessary."

But, the Supreme Court said:

"It (the Federal statute) admits of no supplement: *it is the prescribed measure* of what is necessary and sufficient for the public safety."

That language applies with peculiar force to the renovated butter statutes and the rigid regulations relating to its manufacture. The condition of the finished product is the prescribed measure of what is necessary and sufficient for the public safety.

Again, in *Southern R. Co.* v. *Railroad Commission,* 236 U. S. 439, it was said:

"If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. *In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter.* * * *

"When the question is whether a Federal act overrides a State law, the entire scheme of the statute must, of course, be considered, *and that which needs must be implied is of no less force than that which is expressed.* If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—*the State law must yield to the regulation of Congress within the sphere of its delegated power.* Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182." (Emphasis supplied.)

In our headlight case, in which compliance with one was not defiance of the other, *L. & N. R. R. Co.* v. *State*, 16 Ala. App. at page 202, it was said:

> "When we come to consider whether or not two powers—one superior and the other of inferior jurisdiction—occupy the same field, it would seem proper that any reasonable doubt, if such there is, should be resolved in favor of the superior jurisdiction."

The "compliance-defiance" test was also rejected in the *Napier* case, 272 U. S. 606 on pages 612-613, where the court said:

> "The argument mainly urged by the States in support of the claim that Congress has not occupied the entire field, is that the Federal and State laws are aimed at distinct and different evils; that the Federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the State regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it. Did Congress intend that there might still be State regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?
>
> "The Federal and the State statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But, this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the State legislation. This, also, if true, is without legal significance. The fact that the

Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power."

The same test was rejected in *Oregon-Washington R. R. Co.* v. *Washington*, 270 U. S. 87 on pages 101-102, in the following language:

> "The act we are considering is very different. It makes no reference whatever to cooperation with State authorities.
>
> * * * * * * *
>
> "It follows that, pending the existing legislation of Congress as to quarantine of diseased trees and plants in interstate commerce, the statute of Washington on the subject can not be given application. It is suggested that the States may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the States to quarantine, and that if he does not act there is no invalidity in the State action. Such construction as that can not be given to the Federal statute. The obligation to act without respect to the States is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the Federal law in force, State action is illegal and unwarranted."

The "compliance-defiance" test was rejected in *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 404, which was a suit to recover damages under Sections 9985, 9990, Revised Statutes of Missouri, 1919, which read:

> "'It shall be unlawful for any such common carrier to make or give any undue or unreasonable preference or advantage to any particular person * * * in the transportation of goods * * * or to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage with respect to such transportation * * *' Section 9990, among others things, makes the carrier liable to any person injured by a vio-

lation of the above quoted provision for three times the amount of damages sustained."

Section 3 of the Interstate Commerce Act reads:

> "'That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or for any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.'"

The State statute in effect duplicated the right of action provided by the Federal law.

The court said:

> *"It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive. * * * The State law has no application to the furnishing of cars to shippers for the transportation of freight in interstate commerce."*
>
> *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 408.

The "compliance-defiance" test is merely an illustration of extreme cases, in which it is self-evident that a State enactment cannot stand because of its irreconcilable conflict with a Federal law. But there are many instances in which the owner of property in interstate commerce might comply with both regulations—cases in which compliance with one would not be defiance of the other—in which the Supreme Court of the United States has declined to subject the article in interstate commerce to double regulation.

Take the steamboat case, for instance (*Sinnot* v. *Davenport*, 63 U. S. 227): There the owner of the boat might

well have filed the information in the Probate Office at Mobile, as the State law required, as well as with the collectors as the Federal law required. The case, as we understand it, turns on the proposition that Congress had legislated on the "very subject" which the State act undertook to regulate.

The regulation of interstate commerce is so intimately blended and intertwined with responsibilities of the National Government that where it acts, and the State also acts on the same subject, the Act of Congress is supreme and the law of the State, though enacted in the exercise of powers not controverted, must yield to it, and where the Federal Government in the exercise of its superior authority in this field has enacted a complete scheme of regulation and has therein provided a standard for packing stock butter the State cannot conflict or interfere with, curtail or complement Federal law or enforce additional or auxiliary regulations. This contention is supported by the late case of *Hines* v. *Davidowitz*, 61 Sup. Ct. Rep. 399-403, where the rule was applied with reference to legislation affecting aliens. The power of Congress to regulate interstate commerce is certainly as broad as its power to legislate with respect to aliens.

III.

The Court of Appeals erroneously failed to follow the construction placed on the Alabama Agricultural Code by the Supreme Court of Alabama in State v. Cecil, 216 Ala. 391, and placed its own construction on the Agricultural Code, contrary to the construction placed on it by the highest court in the State, and in doing so disregarded the rule laid down by this Court in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64.

With respect to the Alabama Agricultural Code, Sections 37, 217 and 218, we respectfully insist that before the ap-

pellees are authorized by State Statute to seize an article it must appear:

1. That the article seized is an article of food or drugs.

2. It must be adulterated or misbranded.

3. It must be manufactured for sale in Alabama, held in possession with intent to sell in Alabama, offered or exposed for sale in Alabama, or sold or delivered within Alabama. If it is manufactured for sale or held in possession with intent to sell in Alabama, or offered or exposed for sale in Alabama, or sold or delivered within Alabama the Alabama Agricultural Code does not apply. *State* v. *Cecil, supra.*

The Record in this case refutes any claim that the packing stock butter seized in interstate commerce is an article of food. The petitioner's sole purpose in acquiring it and handling it is to work it over, clean it up and render it wholesome and safe, and after that has been accomplished, to sell and ship 90% of it in interstate commerce.

While the interstate character of the butter seized was not challenged below and was taken for granted by the Circuit Court of Appeals, the respondents intimated that they claimed a right to inspect the raw country butter moving in interstate commerce or held and used by the petitioner in interstate commerce or held and used by the petitioner in interstate commerce for the purpose of manufacturing process butter, for sale and shipment in interstate commerce, because it is admitted that 10% of the finished product of petitioner's plant is distributed to consumers in Alabama through retail outlets in the State.

> "Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation."
>
> *Currin* v. *Wallace*, 306 U. S. 10;
>
> *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50.

The interstate character of the article does not cease until it has become a part of the general mass of property in the State. The fact that the raw butter may be taken from the trucks and stored in petitioner's plant and mixed with other butter acquired in Alabama for manufacture into the finished product for sale and shipment does not take away the interstate character of the raw butter being held for such purpose.

Stafford v. *Wallace*, 258 U. S. 495-528;
Chicago Board of Trade v. *Olsan*, 262 U. S. 1-43.

We think these authorities show that this Court has ruled that the raw butter does not cease to be in interstate commerce because it lays over in petitioner's plant in Birmingham for a few days awaiting manufacture into a pure and finished product for sale and shipment in interstate commerce. The raw butter is all the while in the channel of interstate commerce. The petitioner's plant in Birmingham, in such circumstances, is merely a conduit through which interstate commerce flows. Where intrastate and interstate transactions are necessarily commingled and are so related that the government of the one involves control of the other it is Congress and not the State that is entitled to prescribe the final and dominant rule.

Currin v. *Wallace*, 306 U. S. 1-18;
Minnesota Rate cases, 230 U. S. 352;
Second Employers Liability Cases, 223 U. S. 1.

Where interstate and intrastate operations are necessarily indivisible, and the interstate operations are the dominant operations, the business must be considered as engaged in interstate commerce.

U. S. v. *Darby Lbr. Co.*, 61 Sup. Ct. 451;
Grandin Farmers Coop. Elevator Co. v. *Langner*, 292 U. S. 605;

Shaffers v. *Farmers Grain Co.*, 268 U. S. 190;
Lemke v. *Farmers Grain Co.*, 258 U. S. 50;
Currin v. *Wallace*, 306 U. S. 1.

In determining what is interstate commerce the court looks to practical situations and the established course of business.

Foster Fountain Pkg. Co. v. *Haydell*, 278 U. S. 1.

There is, therefore, no Alabama Statutory authority for the acts of the appellees complained of.

State v. *Cecil*, *supra*.

THE DISSENTING OPINION OF CIRCUIT JUDGE FOSTER:

Attention is respectfully invited to the able dissenting opinion by Circuit Judge Foster concisely stating the issues, and as reasons for his dissent, among other things, saying:

> "The Alabama officers were acting under authority of the Alabama Agricultural Code. In *State* v. *Cecil*, 216 Ala. 391, it was held the enactment of the Agricultural Code was within the exercise of the police power of the State but the operation of the code was confined to intrastate commerce. Conceding that the Alabama regulations are practically the same as the Federal regulations, I consider that Congress has preempted and completely occupied the field as to the manufacture of processed butter for sale and shipment in interstate commerce. The law of Alabama, enforced by State officers, should not be permitted to interfere with the Federal Statute and regulations in respect to shipments in interstate commerce. The bill was dismissed on motion without a trial on the merits. Of course, appellant would have a remedy at law to test the validity of each seizure, but where seizures have been so frequent, and no doubt will continue, if appellant

operates its plant, the remedy at law would not be so complete and adequate as to oust jurisdiction in equity. I consider the judgment of the District Court should be reversed and the case remanded."

Conclusion.

We have been unable to find, and the opinion of the majority of the Circuit Court of Appeals for the Fifth Circuit does not cite, any authority which holds that a State officer may interfere with the continuity of an interstate shipment and seize a legitimate article of commerce moving in interstate commerce because of a claim that the article does not conform to a standard prescribed by State Statute which the highest court in the State does not apply to interstate commerce.

We have been unable to find, and the opinion of the majority of the Circuit Court of Appeals for the Fifth Circuit does not cite, any authority holding that raw butter in *interstate commerce* going into the manufacture of process butter for sale and shipment *in interstate commerce* may be seized by State officers.

We have been unable to find, and the opinion of the majority of the Circuit Court of Appeals for the Fifth Circuit does not cite, any authority which holds that a decision (either expressed or implied) by the Secretary of Agriculture of the United States not to seize raw material in interstate commerce, but to allow industry an opportunity to clean it up and work it over and convert it into a pure and wholesome finished product may be vetoed, annulled and overruled by State officials, or that the State and the United States may exercise jurisdiction at the same time over the same legitimate article of commerce.

We respectfully submit that the decision and judgment of the Honorable United States Circuit Court of Appeals for

the Fifth Circuit was laid in error and for that reason a writ of certiorari should be granted and the decision reversed and its judgment annulled.

Respectfully submitted,

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